Elmer Wayne Henley

STATE'S APPELLATE BRIEF

Copied from the holdings of the Texas State Archives

53561

NO. 74-CR-424
NO. 74-CR-980
NO. 74-CR-981
NO. 74-CR-982
NO. 74-CR-983
NO. 74-CR-984

IN THE 175TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS

ELMER WAYNE HENLEY	X	APPELLANT
V.	X	
THE STATE OF TEXAS	X	APPELLEE

STATE'S APPELLATE BRIEF

CAROL S. VANCE
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

JAMES C. BROUGH
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

DON LAMBRIGHT
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

LUCIEN CAMPBELL
ASSISTANT CRIMINAL DISTRICT ATTORNEY
BEXAR COUNTY, TEXAS

DOUGLAS C. YOUNG
ASSISTANT CRIMINAL DISTRICT ATTORNEY
BEXAR COUNTY, TEXAS

COUNSEL FOR APPELLEE

FILED
May 7, 1976
..... o'clock ....M.
ELTON R. CUDE
Clerk of the District Courts,
Bexar County, Texas
By: Connie Orozco
DEPUTY

FILED IN
COURT OF CRIMINAL APPEALS
OCT 20 1976
Glenn Haynes, Clerk

Copied from the holdings of the Texas State Archives

TABLE OF CONTENTS

	Page
LIST OF AUTHORITIES	i-iii
LIST OF CHARTS	iv
IDEM SONANS ITEM	4
APPELLANT'S COUNSEL	5
SUMMARY OF FACTS	6
STATE'S EXHIBITS CHART	19
LIST OF WITNESSES (TRIAL)	26
REPLY TO APPELLANT'S POINTS OF ERROR	29
Points one to Fifteen	29-31
Point Sixteen	81
Points Seventeen to Twenty-two	82
Points Twenty-three to Twenty-seven	94
Points Twenty-eight to Twenty-nine	99
Points Thirty to Thirty-five	101
Points Thirty-six to Forty-three	106
Points Forty-four to Forty-five	143
VOIR DIRE SUMMARY CHART	65
APPENDIX A	
CERTIFICATE OF SERVICE	161

Copied from the holdings of the Texas State Archives

LIST OF AUTHORITIES

	Page
Albrecht V. State, 486 S.W. 2d 97	104
Barry v. State, 305 S.W.2d 580	90
Blackwell v. State, 510 S.W.2d 952	79
Bridges v. State, 471 S.W.2d 827	57
Calley v. Calloway, 519 F.2d 184, Cert. Den. 19 Cr.L. 4001	80
Campbell v. State, 521 S.W.2d 636	103
Chase v. State, 508 S.W.2d 605	141
Chevallier v. State, 404 S.W.2d 46	100
Clem v. State, 314 S.W.2d 579	93
Cline v. State, 463 S.W.2d 441	100
Cox v. State, 523 S.W.2d 695	104
Davis v. State, 505 S.W.2d 800	82
Enriquez v. State, 429 S.W.2d 141	58
Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 2d 543	57-80
Estrada v. State, 422 S.W.2d 453	100
Fontenot v. State, 378 S.W.2d 334	98
Ford v. State, 502 S.W.2d 160	82
Gatlin v. State, 163 S.W. 428	4
Handy v. State, 138 S.W.2d 541	63
Harrington v. California, 89 S.Ct. 726, 395 U.S. 250	108-142
Harris v. State, 516 S.W.2d 931	145
Irvin v. Dowd, 366 U.S. 717	80
Johnson v. State, 469 S.W.2d 581	79
Johnson v. State, 492 S.W.2d 505	84
Jolley v. State, 363 S.W.2d 269	61
Jones v. State, 27 S.W.2d 653	5
Jones v. State, 290 S.W.2d 671	100
Lee v. State, 454 S.W. 2d 207	100
McCandless v. State, 425 S.W.2d 636	143-158
McCoy v. State, 162 S.W.2d 976	104
McGilvery v. State, 533 S.W.2d 23	141

Copied from the holdings of the Texas State Archives

LIST OF AUTHORITIES, CONT'D.

	Page
Miranda v. Arizona, 384 U.S. 475	143
Moore v. State, Tex.Cr.App. of 4-4-76	82
Mouton v. State, 235 S.W.2d 645	82
Murphy v. Florida, 95 S.Ct. 2031	79
Mutscher v. State, 514 S.W.2d 905	103
Nebraska Press Assn. v. Stuart, 18 Cr.L. 2254, 19 Cr.L. 4017	81
Nelson v. State, 21 S.W.2d 1045	140
Pamplin et al v. Mason, 364 F.2d 1	57
Phillips v. State, 511 S.W.2d 22	91
Price v. State, 496 S.W.2d 103	98
Pugh v. State, 186 S.W.2d 258	61
Raven v. State, 193 S.W.2d 527	5
Reich v. State, 251 S.W. 1072	93
Richardson v. State, 70 S.W.2d 1003	60
Rideau v. Louisiana, 377 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663	57-80
Robbins v. State, 487 S.W.2d 62	104
Rogers v. State, 468 S.W.2d 438	142
Rhodes v. State, 262 S.W. 753	140
Salazar v. State, 193 S.W.2d 211	94
Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 15 L.Ed. 2d 600	79
Simpson v. State, 507 S.W.2d 530	103
Sirls v. State, 511 S.W.2d 55	142
Slaton v. State, 484 S.W.2d 102	82
Smith v. State, 514 S.W.2d 749	141
State v. Sannerud, 38 Minn. 229, 36 N.W. 447	4
U.S. v. Abbott Laboratories,(4th Cir.) 505 F.2d 565	80
U.S. v. Chapin, (U.S.C.A. D.C.) 515 F.2d 1274	80
U.S. v. Mandel, (U.S. S.Ct.) 19 Cr.L.2034	80
U.S. v. Martinez(U.S.C.A. 5th,1974) 426 F.2d 446	100
Walker v. State, 440 S.W.2d 653	104
Ward v. State, 427 S.W.2d 876	61
Williams v. State, 27 S.W.2d 233	141
Wilson v. State, 473 S.W.2d 532	141
Wolfe v. State, 177 S.W.2d 274	93-94
17 ALR 3d 148	63
10 L.Ed. 2d 1243	63

Copied from the holdings of the Texas State Archives

LIST OF AUTHORITIES, CONT'D.

	Page
BRANCH'S ANN. P.C.2d, Sec. 543.....	98
CODE OF CRIMINAL PROCEDURE, Art. 42.08.....	84
CODE OF CRIMINAL PROCEDURE, Art. 38.05.....	99
CODE OF CRIMINAL PROCEDURE, Art. 38.22.....	136
TEXAS CONSTITUTION, Art. I, Sec. 10.....	31,88
TEXAS CONSTITUTION, Art. III, Sec. 45.....	31
31 TEXAS JUR.2d, Instructions, Secs. 94 & 95..	100,101
40 TEXAS JUR.2d, Names, Sec. 28.....	4
TEXAS PENAL CODE, Sec. 9.31.....	105
TEXAS PENAL CODE, Sec. 9.32.....	105
TEXAS PENAL CODE, Sec. 9.33.....	105
TEXAS PENAL CODE OF 1925, Art. 1142.....	105
TEXAS PENAL CODE OF 1925, Art. 1207.....	105
TEXAS PENAL CODE OF 1925, Art. 1221.....	105
TEXAS PENAL CODE OF 1925, Art. 1222.....	105
TEXAS PENAL CODE OF 1925, Art. 1225.....	105
TEXAS PENAL CODE OF 1925, Art. 1226.....	105

Copied from the holdings of the Texas State Archives

LIST OF CHARTS

	Page
BEXAR and HARRIS COUNTY COMPARATIVE CAUSE NUMBERS	1
TABLES OF VOLUMES OF RECORD (Showing which volumes are transcripts, which are Bexar County Pre-trial, which are trial statement of facts, which are Harris County Pre-trial	2-3
Summary of autopsy evidence, showing where the body of each victim here in issue was recovered and dates and cases of death	17
STATE'S EXHIBITS (Listing 96 State's Exhibits, and showing pages where each was marked or referred to, admitted, where, if it was, objection was expressly waived, and briefly noting content of each.	19-26
LIST OF WITNESSES AT TRIAL ON GUILT, by volume and page number	26-28
VOIR DIRE SUMMARY (Listing all venire persons voir-dired, result of each, and pages of record applicable.	65-78

Copied from the holdings of the Texas State Archives

TO THE HONORABLE JUDGE OF SAID COURT:

There are six different appeals here, with six 99-year sentences, five of them cumulated.

The record includes Transcript Volumes I to VII.

Transcript Vols. I to IIA contain papers filed in one case. Each volume of Transcript Volumes III to VII have therein papers filed in a separate case, with separate page numbering systems in each volume.

Volume III and thereafter of the record applies to complete the record in each of these six cases.

The indictments in these six murder cases were returned to Harris County and tried in Bexar County on change of venue. The defendant is the same in each case.

Here is a list of the six cases, and citations to the record showing this data. The citations are from the applicable transcript volumes:

BEXAR CAUSE NO.	HARRIS CAUSE NO.	NAME OF VICTIM	TRANS. VOL.	TRANS. PAGES Cit'n.
74-CR-980	198893	Marty Jones	III	12;149
74-CR-981	198895	Billy Lawrence	IV	13;160
74-CR-982	198496	Johnny Delome	V	9-11;150
74-CR-983	200329	Frank Aguirre	VI	20-21;156
74-CR-984	200330	Homer Garcia	VII	20-21;156
74-CR-424	198892	Charles Cobble	I & II	16;193

For the convenience of the Court, a table of the content of the 30 volumes of the record is here presented, as follows:

Copied from the holdings of the Texas State Archives

TABLES OF VOLUMES OF RECORD

ELMER WAYNE HENLEY VS.
THE STATE OF TEXAS

175TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

TRANSCRIPTS

CAUSE NUMBERS

74-CR-424; 74-CR-980; 74-CR-981; 74-CR-982; 74-CR-983; 74-CR-984

VOLUME NO.	CAUSE NO.	NO. OF PAGES IN RECORD	ITEM	HARRIS NO.	SURNAME OF VICTIM
Transcript Vol. III	74-CR-980	0-201	Transcript by Clerk	198893	Jones
Transcript Vol. IV	74-CR-981	1-201D	Transcript by Clerk	198895	Lawrence
Transcript Vol. V	74-CR-982	0-203	Transcript by Clerk	198496	Delome
Transcript Vol. VI	74-CR-983	0-210D	Transcript by Clerk	200329	Aguirre
Transcript Vol. VII	74-CR-984	0-203	Transcript by Clerk	200330	Garcia
Transcript Vol. I	74-CR-424	1-374	Transcript by Clerk	198892	Cobble
Transcript Vol. II & II-A	74-CR-424	375-627H	Transcript by Clerk	198892	Cobble

PRE-TRIAL RECORD IN BEXAR COUNTY

CLERK'S VOL. NO.	CAUSE NO.	PAGES OF RECORD BY CLERK'S PAGE NUMBERS	BEXAR COUNTY PRE-TRIAL VOL. DESIGNATION	ITEM
Vol.III	All 6 cases			Index of pre-trial
Vol.IIIA	All 6 cases	628-776	A	Pre-trial motion
Vol. IV	All 6 cases	777-1037	B	Opening statement and Voir Dire
Vol. V	All 6 cases	1038-1295	C	Voir Dire Cont'd.
Vol. VI	All 6 cases	1296-1580	D	" " "
Vol. VII	All 6 cases	1581-1874	E	" " "
Vol. VIII	All 6 cases	1875-2084	F	" " "
VOL. IX	All 6 cases	2085-2232	G	" " "

Copied from the holdings of the Texas State Archives

TRIAL RECORD

CLERK'S VOL.NO.	CAUSE NO.	PAGES OF RECORD BY CLERK'S PAGE NUMBERS	TRIAL VOL. NUMBER	ITEM
Vol. X	All 6 cases	2233-2375	I	S/F 1-139
Vol. XI	All 6 cases	2376-2646	II	S/F 140-407
Vol. XII	All 6 cases	2647-2882	III	S/F 408-639
Vol. XIII	All 6 cases	2883-3122	IV	S/F 640-875
Vol. XIV	All 6 cases	3123-3248	V	S/F 876-998
Vol. XV	All 6 cases	3249-3351	VI	Trial exhibits
Vol. XVI	All 6 cases	3352-3485	VII	Objections to exhibits and argument
Vol. XVII	All 6 cases	3486-3626	VIII	Motion for new trial
Vol.XVIII	All 6 cases	3627-3830	IX	Motion for new trial and exhibits

PRE-TRIAL IN HARRIS COUNTY

CLERK'S VOL.NO.	PAGES OF RECORD BY CLERK'S PAGE RECORD	S/F PAGES	ITEM
XIX	3831-3963	1-133	Pre-Trial Motions
XX	3964-4458	133-487	Motion to Suppress
XXI	4460-4929	489-993	Motion to Suppress
XXII	4930-5458	994-1522	Motion to Suppress
XXIII	5459-5557	672-693 977-993 1210-1269	Motion to Suppress (Sealed)

Copied from the holdings of the Texas State Archives

IDEM SONANS ITEM

In respect to the court, it appears necessary to mention a matter which appellant has not raised, as to Harris County Number 198,496, being Bexar County Cause Number 74-CR-982. This case relates to the murder of Johnny Delome.

At pages 9 and 125 of Transcript Vol. V, the indictment and charge of the court, respectively, spell the surname of the deceased Delome. The proof, however, appears throughout the record, in confession of appellant as well as in statement of facts by the court reporter, as Delone.

No issue was raised as to this technical variance at trial or in the ancillary proceedings, and appellant has not mentioned it in his 266 page (exclusive of exhibits) brief on appeal. The obvious reason for this is that the technical variance patently is not reversible error.

The spellings Delome and Delone are idem sonans, 40 Tex. Jur. 2d, Names, Sec. 28 at n.8. This reference lists as idem sonans the names James and Janes, citing Gatlin v. State, 163 S.W. 428, clearly making the consonants m and n idem sonans. Likewise, in State v. Sannerud, 38 Minn. 299, 36 N.W. 447, holding Samrud and Sannerud idem sonans.

A reading of Gatlin v. State, supra, shows that the victim there, named Janes, was also known as James, the name alleged. Here there is no such showing, but the rule of idem sonans makes it obvious that these two consonants are idem sonans as here used.

The rule is that the variance will be regarded as

Copied from the holdings of the Texas State Archives

immaterial if the variant forms of the name can be sounded alike without doing violence to the power of the letters used, 40 Tex. Jur. 2d, Names, Sec. 28.

In Raven v. State, 193 S.W.2d 527, citing Jones v. State, 27 S.W.2d 653, it was pointed out that the doctrine of idem sonans has been much enlarged by recent decisions to conform to the growing rule that a variance in a name, to be materials, must be such as to have misled a party to his prejudice.

In the case at bar, as in the Raven case (where Zoda and Zoder were held idem sonans), there is nothing in the record that would, in the remotest degree, indicate that appellant was misled.

Clearly Delome and Delone are idem sonans.

APPELLANT'S COUNSEL

Appellant was represented by his counsel of choice, Hon. Will Gray as lead counsel and Hon. Edwin F. Pegelow (R-5546, line 2 to R-5519, line 25). Hon. Charles Melder, the other counsel of choice, withdrew (R-115-116).

The court appointed Mr. Gray and Mr. Pegelow, in order that they might be paid (R. 472-3).

Hon. Rudy Esquivel of Bexar County was appointed, at request of appellant's other counsel, as local counsel in San Antonio (R. 471).

Copied from the holdings of the Texas State Archives

SUMMARY OF FACTS

The evidence at trial showed that appellant made a written statement (See at R. 5427-8, R. 3293 and R. 3310).

The original statement was put in evidence at the motion to suppress pre-trial as Defendant's Exhibit 7 and is at R. 5427-8. A signed carbon copy of the statement is at R.3293, put in evidence at trial at R. 2349.

As can there be seen, two typed lines were superimposed on two printed lines.

As a result, a xerox copy of the original statement (R. 2565, R.2575) was introduced as State's Exhibit 49 (R. 2580) and can be seen at R. 3310. Each has the same deletions (R. 2572) but in Exhibit 49 the two typed lines are not superimposed on the printed lines.

The written statement, Exhibit 49, reads as follows:

> Statement of Elmer Wayne Henley, taken a 114 Davis, Pasadena Police Department, Harris County, Texas.
>
> On the 8th day of August, 1973, at 10:55 o'clock A.M., I, Elmer Wayne Henley, was taken before Judge Russell Drake, a Magistrate at his office Pasadena, Harris County, Texas, who informed me:
>
> Of the accusations made against me;
> That I had a right to retain counsel;
> That I had a right to remain silent;
> That I had a right to have an attorney present during my interview with peace officer or attorneys representing the state;
> That I have a right to terminate an interview at any time;
> That I have a right to request appointment of counsel if I cannot afford counsel;
> That I have a right to an examining trial;
> That I am not required to make any statement, and any statement I make may be used against me.

Copied from the holdings of the Texas State Archives

I have now been warned by Detective D. M. Mullican, the person to whom I am making this statement, and was so warned by Detective D. M. Mullican prior to any questioning of me by police while I was under arrest;

(1) that I have the right to have a lawyer present to advise me either prior to any questioning or during any questioning; (2) that if I am unable to employ a lawyer I have the right to have a lawyer appointed to counsel with me prior to or during any questioning, and (3) I have the right to remain silent and not make any statement at all and that any statement I make may and probably will be used in evidence against me at my trial, and (4) I have the right to terminate the interview at any time.

I do not want to consult with a lawyer before I make this statement, and I do not want to remain silent, and I now freely and voluntarily waive my right to a lawyer and to remain silent and make the following voluntary statement.

My name is Elmer Wayne Henley, I am a white male 17 years old and was born on 5-9-56 in Houston, Texas. I have completed the 8th grade in school and can read and write the English Language. I presently live with my Mother at 325 West 27th Street in Houston, Texas.

About 3 years ago, I met a guy by the name of Dean Corll. Dean was a lot older than me and a school friend by the name of David Brooks introduced me to him. David was always riding around in Dean's car and everything. I was only about 14 at the time and I thought this was great. David Brooks told me that he could get me in on a deal where I could make some money, and he took me to Dean Corll. Dean told me that he belonged to an organization out of Dallas that bought and sold boys, ran whores and dope and stuff like that. Dean told me that he would pay me $200.00 at least for every boy that I could bring him and maybe more if they were real good looking boys. I didn't try to find any for him until about a year later, and I decided that I could use the money to get better things for my people so one day I went over to Dean's Apt on Schuler street and told him that I would find a boy for him. Dean had a GTX at the time, and we got in it, Dean and me and started driving around. We picked up a boy at 11th and Studewood, and I talked to him since I had long hair and all and it was easier for me to talk to him. I talked him into going to Dean's Apt so we went over to Dean's Apt. Dean left some handcuffs laying out where they could be seen, and we had this little deal set up where I would put

Copied from the holdings of the Texas State Archives

the handcuffs on and then could get out of them. Then we talked this boy (I don't remember his name) into trying to get out of them. The only thing was we put them on where the locks were turned in where he couldn't get the key into them. Then Dean took the boy down and tied his feet and put tape over his mouth. I thought Dean was going to sell him to this organization that he belonged to, so I left. Then the next day, Dean paid me $200.00. Then a day or so later I found out that dean had killed the boy. Then I found out that Dean screwed him in the ass before killing him. This was the start of the whole thing, and since then, I have helped Dean get boys, I don't remember exactly how many. Dean would screw all of them and sometimes suck them and make them suck him. Then he would kill them. I killed several of them myself with Dean's gun and helped him choke some others. Then we would take them and bury them in different places. David Brooks was with us on most of them.

I think the only three that David Brooks wasn't with us on was the last ones at the house on Lamar Street in Pasadena. The ones that I can remember by name are Charles Cobble who I killed and we buried in the boat stall. I shot Charles in the head with Dean's pistol, over on Lamar Street in Pasadena, then we buried him in the boat stall. We killed a boy by the name of Billy Lawrence, I don't remember how we killed him but we buried him up at Dean's place on Sam Rayburn Lake. We killed him at the house on Lamar Street too.

I shot qnd killed Johnny Delone, and we buried him at High Island.

We choked Frank Aguirre and buried hem (sic) in the head and we buried him at Rayburn. The last one that I cna (sic) remember their name is Homer Garcia, and I shot him in the head and we buried him at Rayburn. I don't remember the dates on all these, because there has been too many of them. Some of them were hitch-hikers and I can't remember their names.

While making this statement, I have not asked for nor wanted the presence or advise of a lawyer. At no time during the making of this statement did I ask to stop or want to stop making this statement.

I have read the 2 page(s) of this statement, each page of which bears my signature, and the facts contained therein are true and correct.

Copied from the holdings of the Texas State Archives

This statement was finished at 12:30 P.M. on the 9th day of August, 1973.

Appellant led officers on a tour of disinterment which resulted in recovery of twenty-seven bodies (R. 2818: 26 received in Houston; R. 2844: Billy Lawrence not received in Houston) including the six victims in the cases at bar. As the tour proceeded, appellant told officers where the bodies were buried, directing the officers in their recovery of the bodies. During this time appellant freely discussed with the officers the conduct on the part of himself, David Brooks and Dean Corll which had resulted in and included the murder of the youths whose bodies they were then recovering.

Appellant obviously had a great inner need to make these voluntary disclosures.

Officer J. B. Jamison, first officer to see appellant after Henley had killed Dean Corll, an obvious justifiable homicide in defense of himself and two other young people, testified as follows (R. 2260, lines 15-19):

> "A. After being given the warning, approximately two or three minutes later, the defendant, Henley, sitting in the back seat sobbing blurted out that he said he didn't care who knew that he had to get it off his chest but he might know where there would be some more bodies (Emphasis added).

The following concise summary of some of the evidence at trial is quoted from pages 200 to 204 and 231 to 233 of appellant's brief, verbatim, except for bracketed deletions, and with these slight alterations the state agrees to their accuracy.

Copied from the holdings of the Texas State Archives

The first is a summary of a portion of testimony of Detective Sergeant Mullican, as follows (pp. 200 to 204 of appellant's brief):

> Mullican (then) narrated the following oral admissions, allegedly made by appellant during the ride to the lake:
>
> 1. He thought Billy Lawrence was buried at Rayburn. . . .
>
> 2. Mullican asked appellant if he ever worried about hauling bodies to Sam Rayburn and High Island; what would happen if they were stopped by highway patrolmen for a traffic violation. Appellant said this was no problem because the bodies were always carried in the body box, and described the box to Mullican. Appellant identified the box located in Corll's tool shed as the "body box." (R. 2360-2361).
>
> 3. Appellant said he could lead Mullican to where bodies were buried and that he had helped bury several of them; that's why he knew where they were located. (R. 2362).
>
> 4. When they reached San Augustine, where they were joined by other law officers, appellant directed Mullican to a location where ultimately other bodies were found. This was in a heavily wooded area, reached by dirt and gravel roads that cut through a national forest. (R. 2363).
>
> 5. Two bodies were recovered on the night of August 9, 1973, in this isolated area. They were buried about a hundred yeards apart. Appellant identified one of these graves as that of Billy Lawrence. (R. 2365).
>
> 6. After the Lawrence grave was located, appellant directed Mullican to drive on down the road where he indicated a spot where he thought Homer Garcia was buried. (R. 2366).
>
> 7. Appellant admitted to Mullican that he had helped bury these bodies. (R. 2366).
>
> 8. The next morning, Appellant led Mullican back to the same area and pointed out the location of two more graves. He said he believed that one of the bodies was Homer Garcia and he believed one of them might be Frank Aguirre. He couldn't remember for sure. (R. 2369).

Copied from the holdings of the Texas State Archives

When Mullican returned to the witness stand the next morning, he recalled additional oral statements allegedly made by appellant during the trip from Houston to San Augustine.

9. Mullican asked appellant where the handcuffs were obtained. He said that Corll bought most of them in pawn shops in Houston. Mullican asked where the handcuffs were kept and how they were used. Appellant told him again about the "trick" that he and Corll and Brooks used on some of the victims and that he, appellant, would put handcuffs on behind him and then get out of them and get the victim to put them on and see if he could get out of them. Once they were handcuffed, usually Corll and appellant would take the victims down and attach them to the board. (R. 2417-2418).

10. Appellant talked about one specific incident where one of the victims, Frank Aguirre, was involved. Appellant was at Corll's apartment when Aguirre just happened to stop by. They knew him previously from the neighborhood. Appellant got him to do the handcuff trick and "took him down." (R. 2419). They later killed and buried Aguirre after "Corll had had his fun with him." (R. 2421). Appellant described Corll's "fun" as having "sex with them in the rectum. Oral sodomy." (R. 2422).

11. Appellant told Mullican about choking Marty Jones with a piece of rope and he said: "It's not easy to choke somebody and kill them like it shows on TV. You have to choke them like this, real strong, and it's hard to kill them. They won't hardly die. When I killed -- when we killed Marty Jones, I had to get Dean to come in and help me." (R. 2423).

12. Appellant described the problem they had with burying one of the victims at Rayburn. He said that "when they would bury a body there at Sam Rayburn, they would take a piece of rug out to the grave-site with the body and when they dug the loose dirt up out of the hole, they used to put the body in, they would put the dirt on the rug so that there wouldn't be loose dirt around. He also said that one of the bodies they buried, when they went to bury another body, one body had come up. There was a hand and part of and arm sticking up out of the grave and they had to put a piece of board or something over the body to keep it from coming up." Mullican recalled having seen some carpeting at the boat stall. (R. 2424).

Copied from the holdings of the Texas State Archives

13. Corll's father worked at Baylor Medical College and Corll got the plastic from there, from his father. The roll of plastic found at Corll's house was in a cardboard box that had "Baylor Medical College" written on it. (R. 2426).

From Lake Sam Rayburn, the officers took appellant to High Island. During this drive, he made the following oral admissions:

14. There were several bodies buried at High Island, all up and down the beach. Appellant had helped bury some of them and he had been told about others. (R. 2372).

15. Appellant directed Mullican down a black-top road to the beach. He led the officers to a rock where he said a body was buried, and that five or six bodies were scattered along the beach for quite a distance "right along in the same line with where this rock was." (R. 2434).

16. Appellant thought the bodies of Johnny Delone and Frank Aguirre were buried at High Island but he wasn't sure of the exact location. (R. 2439).

During the ride from High Island back to the Pasadena police station, appellant (~~allegedly~~) made the following oral admissions:

17. Appellant told Mullican and Smith "about several ways the victims were tortured prior to being killed. Billy Lawrence had been kept about three days because Corll "liked him particularly." They had kept him alive chained or handcuffed to the board for about three days. Appellant, Corll and Brooks had used the rubber dildo on Lawrence and all the other victims. "They had shoved it up his butt." They had pulled their pubic hair out, one at a time. They had shoved glass rods up their penis. These were glass rods like those found in Corll's tool box. The large porcelain bullet-shaped instrument, found in Corll's tool box, was shoved into the victims rectum. The victims were handcuffed to the board, sometimes to a wall with their mouths taped with adhesive tape so they couldn't make any noise. The victims were "split eagle, face down on the board in a loose manner so that they could move just a little bit where it could be turned on their side, either way but couldn't move off the board." The "board" was the one found at Corll's house (R. 2451-2458).

Copied from the holdings of the Texas State Archives

18. "Directly following the conversation about the torture, (Mullican) asked (appellant to tell them), specifically, which persons he had killed, himself, in Pasadena in the houst at 2020 Lamar. At that tiem, he said that he had killed Charles Cobble, Marty Jones, Billy Lawrence." (R.2458).

19. Appellant said that he shot Charles Cobble in the right temple and that he had choked Marty Jones, within a short time, on the same day. (R. 2459).

20. Appellant said "that if there were two they would be handcuffed to each side of the board, one on each side of the board in the same manner that he had said that Rhonda Williams and Timothy Kerley were attached to the board." (R. 2460). "The hands would be handcuffed to one end of the board and the feet to the other end of the board, as the board was in a flat position on the floor, which would put the victims laying partially on their side, partially on their stomach." (R.2461).

21. Appellant said "that Cobble and Jones had been the two bodies that were tied together that we found at the boat stall on the night of the 8th. (R. 2468).

22. By referring to notes allegedly made by detective Smith, Mullican related that appellant told them he shot Homer Garcia in the temple. (R. 2483). This occurred about four weeks before August 10, 1973. (R. 2485). (Bracketed material deleted by writer of this brief) (Page 200 to 204 appellant's brief).

Detective Smith, from whose notes Detective Sergeant Mullican testified relating to Homer Garcia, testified (R. 3187), that appellant, in this conversation, said he shot Homer Garcia in the head, he believed in the left temple.

The second summary statement from appellant's brief deals with testimony of various witnesses, and is as follows (pp 231 to 233 of appellant's brief):

"After the noon recess, when Smith was questioned

Copied from the holdings of the Texas State Archives

by District Attorney Vance, he recalled that appellant had mentioned the "body box." "We asked him what would have happened if the Highway patrol had stopped him while they were hauling the body to Sam Rayburn and what would have happened if they would have opened up the van and looked in the back of it. And he said that they wouldn't have seen a body, they would have seen a box. And we asked him what box. And he said Dean had a box he called his body box, a wooden box, and described it. And this is when we learned the significance of the box that we saw the previous night." (R. 4525).

"Houston police officer K. D. Porter testified that on August 14, 1973, he and detective Paulk saw appelllant in the Harris County Jail. Appellant "gave" them hair samples from the head and pubic area. (R. 2685). The detectives placed this evidence in the lock box at the homicide division. (R. 2687).

"Houston detective W. L. Young took the envelopes containing these hairs from the lock box to the laboratory and gave them to Mr. Zotter. (R. 2692).

"James Zotter, a chemist and toxicologist for the Houston police department, received the closed "body box" from Pasadena officer Moore, examined it, and recovered therefrom four hairs which he kept for analysis and comparison. (R. 3003-3010).

"Zotter received other hairs from Dr. Jachimczyk at the Harris County morgue on September 27, 1973. Some of these hairs were from Charles Cobble (R. 3010).

"Zotter also received a bag of clothing, State's Exhibit No. 52, from Norbert LeBlanc in the laboratory on August 9, 1973. (R. 3013). Zotter examined the clothing and retained several hairs from a pair of size thirty briefs. Several hairs were retained from a light blue knit shirt that had a white sea gull on it. A hair was recovered from a pair of black and brown elevator shoes. Several other hairs were recovered from a pair of size sixteen briefs. (R. 3015).

"The appellant's head hair, State's Exhibit No. 50, and pubic hair, State's Exhibit No. 51, were compared by Zotter with one hair recovered from the "body box", State's Exhibit No. 26. The hair from the box "was microscopically identical with the hair submitted in State's Exhibit No. 50." (R. 3022).

Copied from the holdings of the Texas State Archives

"One of the hairs recovered from the box (SX 26) was microscopically identical with the hairs submitted from the body of Charles Cobble by Dr. Jachimczyk. (R. 3029).

"One pubic hair from the blue pull-over shirt was microscopically identical with the hair submitted in State's Exhibit No. 51. Another pubic hair on the pair of black and brown elevator shoes was also identical with those submitted in State's Exhibit No. 51. (R. 3030-3032).

"Three pubic hairs and two head hairs were recovered from two pair of briefs. These were also identical with Exhibits 50 and 51. (R. 3033-3035).

"Zotter also found several hairs on the dildo that were identical with head hairs submitted in Exhibit 50. (R. 3036).

"Dr. Joseph A. Jachimczyk, Chief Medical Examiner for Harris County, identified the bodies of Charles Cobble, Marty Ray Jones, Homer Garcia, Frank Aguirre, and Johnny Delone, by comparing their known dental x-rays and records with x-rays made by him. (R. 2778-2784, 2799, 2815, 2834, 2842).

"In Jachimczyk's opinion, Cobble was killed by two gunshot wounds of the head (R. 2777); Jones by axphyxia due to ligature strangulation (R. 2794); Garcia by three gunshot wounds of the head and chest (R. 2809); Aguirre by asphyxia due to strangulation and gagging and a gunshot wound to the head. (R. 2837).

"Dr. Jack Pruitt, a ("shade-tree") pathologist from Lufkin, examined four bodies in a shed behind a funeral home in San Augustine, Texas, on August 10, 1973. (R. 2940-2941). One of the bodies examined by him was later determined to be that of Homer Garcia.(R. 2942). It was Pruitt's opinion that Garcia dies "as a result of strangulation with possible suffocation due to the bag over head." Pruitt found no evidence of the three gunshot wounds about which Jachimczyk testified . (R. 2945).

"Pruitt identified a second body examined by him as that of William Ray Lawrence. This body matched a physical description given the doctor . (R. 2954). Pruitt also used a picture of Lawrence from the Houston Post on August 12, to compare the 'position of the teeth' in the body he examined. (R. 2970). In Pruitt's opinion, Lawrence met his death by strangulation. (R. 2959).

Copied from the holdings of the Texas State Archives

"Fred Rymer, Supervisior, firearms section, Scientific Crime Laboratory, Texas Department of Public Safety, compared the projectiles removed from the bodies of Cobble, Garcia and Delone, with others test fired by him from the pistol with which appellant killed Corll. It was his opinion that the Cobble and Garcia bullets came from the Corll pistol. (R. 2992-2993, 2995). The Delone bullet was a .25 caliber and the weapon from which it was fired was not introduced in evidence. (R. 2990).

"It is apparent from the foregoing that the evidence was sufficient to support the jury's verdict. (assuming) that it was admissible and, if inadmissible, that its introduction was harmless error. The critical area of dispute involves the alleged oral confessions, all of them made after appellant had purportedly been adv·ised of his constitutional rights under Article 38.22, Sec. 1(e), V.A.C.C.P."(Bracketed material deleted by writer of this brief (pp 231 to 233 of appellant's brief).

Most of the clothes in the above mentioned State's Exhibit 52 were identified by Charles Cobble's mother as being clothing of Charles Cobble or Marty Jones (R. 3109-3110). This bag of clothing was recovered at a location of the bodies of these two victims, a boat stall at 4500 Silverbell (R. 2308) in Houston (R. 2316, R. 2754, R.3011, R. 3030, R. 3121).

Some of the evidence given by pathologists who conducted the autopsies of the victims in the cases at bar is shown in the following chart:

Copied from the holdings of the Texas State Archives

Autopsy Testimony Summary

Record Page	Victim's Name	Date Died	Where Body Recovered	Harris County Medical Examiner Body No.	Cause of Death
R.2817 R.2815 R.2809 R.2802 R.2801-2	Homer Garcia	July 18,1973	San Augustine	73-3377	Left head & Chest Gunshot Wounds
R.2817 R.2818 R.2824 R.2834	Frank Aguirre	Feb.24,1972	High Island	73-3409	Strangulation & Gag
R.2835 R.2842 R.2837 R.2839	Johnny Delone	May 21,1972	High Island	73-3412	Gunshot-head and strangle & Gag
R.2959 R.2801 R.2941 R.2959 R.2959 R.2941	William Ray Lawrence	Dead one month prior to Aug.10, 1973	Lake Rayburn San Augustine		Strangled
R.2784 R.2773 R.2787 R.2772 R.2774	Charles Cobble	2 weeks before Aug. 9, 1973	4500 Silverbell	73-3335	2 Gunshot wounds of head
R.2789 R.2789 R.2799 R.2794 R.2790	Marty Jones	2 weeks before Aug. 9, 1973	4500 Silverbell	73-3334	Strangulation

Copied from the holdings of the Texas State Archives

EXHIBITS

There is an excellent index to exhibits introduced at trial, at R. 3255 to R. 3272, briefly describing the exhibits and showing where in the record each was marked, admitted and is shown. The page numbers there given are those of the trial statement of facts, termed in the record "daily copy" because the court reporters got it out day by day during trial. This "daily copy" begins in Volume X, which is Trial Volume I. There, page 2233 of the record is page 1 of daily copy.

For such value as it may be to the court, a list of exhibits prepared for reference by the writer of this brief, by the clerk's page numbers, showing pages where it is marked or referred to, and where objections thereto were expressly waived, is shown: (Exhibits at trial only).

Copied from the holdings of the Texas State Archives

STATE'S EXHIBITS

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
R.2246	S-1	R.2245 to R.2247	R.2246	Pistol-on sidewalk at 2020 Lamr, Aug. 8,1973 No.026823 Armsco seven-shot .22 caliber revol.
		R. 2303		Custody
		R.2993		Ballistics-S-1 fired S-41(bullets-Cobble)
		R.2995		Ballestics-S-1 fired S-42 (bullets-Garcia)
R.2333	S-2	R.2270-2271	R.2333	Warning to Defendant by Judge Russell Drake
			R.2274	Read in evidence
	S-3	R.2289	R.2290	Diagram of house at 2020 Lamar (picture)
R.2293	S-4	R.2291	R.2293	8'x2½' board with ropes and handcuffs (picture)
R.2299	S-5	R.2298	R.2299	Tool box,picture with dildo, glass rods,etc.
	S-6	R.2300		Wood box found at 2020 Lamar in outbuilding
R.2315	S-7	R.2314	R.2316	Diagram of boat stall No.11 on Silver Bell
R.2321	S-8	R.2317		Picture of boat stall
R.2321	S-9	R.2318	R.2322	Picture of boat stall area
R.2321	S-10	R.2318	R.2322	Picture of inside of boat stall
R.2321	S-11	R.2316 R.2318	R.2322	Picture of part of boat stall
	S-12	R.2318		Picture of part of boat stall withdrawn at R.2322
R.2321	S-13	R.2319	R.2322	Picture of bag of lime in boat stall

Copied from the holdings of the Texas State Archives

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
R.2321	S-14	R.2319	R.2322	Picture of entrance of boat stall
R.2321	S-15	R.2319	R.2322	Picture of interior of boat stall
R.2321	S-16	R.2319	R.2322	Picture of part of boat stall
R.2321	S-17	R.2319	R.2322	Picture of clothing in boat stall
R.2321	S-18	R.2320	R.2322	Picture of bike in boat stall
R.2321	S-19	R.2320	R.2322	Picture of general interior of boat stall
	S-20	R.2330		First grave site (bodies 1 & 2)
	S-21	R.2330		2nd hole (bodies 3 & 4)
	S-22	R.2330		Bodies 3 & 4
	S-23	R.2330		Bodies 3 & 4
R.2325	S-24	R.2324 & 2325	R.2325	Diagram-location of various bodies at 4500 Silver Bell
R.2334	S-25	R.2333 & 3136	R.2335	Picture of Billy Lawrence on chest of drawers at Dean Corll's house, Aug. 8, 1973
R.2634	S-26	R.2336 & 3008	R.2634	Box found in tool shed (body box)
		R.3027		Henley hair
		R.3029 3036 3028		Cobble hair
	S-27	R.2336		Three tags from Exhibit 26 (not displayed to jury)

Copied from the holdings of the Texas State Archives

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
	S-28	R.2343	R.2349	Warning read to Defendant
		R.2522		Carbon of Defendant's (original in evidence in Houston) (See original as D-7 at R. 5427)
	S-29	R.2363 & 2364		Area where body recovered-Billy Lawrence-Objection sustained at R.2363
R.2364	S-30	R.2363 & 2364	R.2365	Area where a body recovered-Lawrence
R.2370	S-31	R.2369	R.2370	Site where 2 bodies found at Rayburn, August 10, 1973. One is Garcia.
	S-32	R.2370		(same site)
R.2374	S-33	R.2373	R.2374	Picture of beach area where bodies found.
R.2374	S-34	R.2373	R.2374	" " " " "
	S-35	R.2448		Picture-scene including rock and first grave site uncovered at High Island (Ruben Haney)
	S-36	R.2462		Diagram-use of board for two at Corll's
R.2465	S-37	R.2463	R.2465	Inside of Corll's van (portion)
R.2465	S-38	R.2463	R.2465	" " " "
R.2465	S-39	R.2463	R.2465	" " " "
R.1354	S-40	R.2463	R.2465	" " " "

Copied from the holdings of the Texas State Archives

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
	S-41	R.2495	R.2850	Two bullets received from Dr. Jachimczyk
		R.2777		Case No. 73-3335
		R.2989 & 2993		Ballistic
	S-42	R.2495	R.2850	Three bullets from Dr. Jachimczyk
		R.2804		Case No. 73-3377
	S-43	R.2499		Bullets received from Dr. Jachimczyk
R.3193	S-44	R.2499	R.3193	Box in which pistol & Exhibits 41 to 43 were kept
		R.2987		Ballistics - re:pistol
R.3193	S-45	R.2501	R.3193	Smaller box that was inside Exhibit 44
	S-46	R.2505	R.2506	Tool box & contents from 2020 Lamar
R.2511	S-47	R.2510	R.2511	Board, handcuffs, rope, & pillow
R.2637	S-48	R.2512	R.2637	Adhesive tape
R.2575 line 16-18	S-49	R.2565	R.2580	Xerox copy of oral confession (Original at R.5427 at D-7
But see R.2578		R.2572		Exhibit 49 with deletion as in Exhibit 28
		R.2575		This is confession copy Mullican made from his office retained copy
	S-50	R.2685	R.3016	Henley hair from head taken August 14,1973

Copied from the holdings of the Texas State Archives

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
		R.3027		Exhibit 50 identical to hair in body box at Exhibit 26
	S-51	R.2686	R.3016	Henley pubic hair taken 8/14/73
	S-52	R.2754	R.3121	Plastic bag of clothing from boat stall
		R.3011 R.3030		Pubic hair from clothing and from Henley similar (Zotter)
R.2778	S-53	R.2778	R.2779	Photos of teeth - Case No. 73-3335-by Dr.Jachimczyk
R.2778	S-54	R.2778	R.2779	" " "
R.2786	S-55	R.2780	R.2786	Jawbone pictures - Case No. 73-3335 by Dr. Paul Stimson in Dr. Jachimczyk's presence
R.2786	S-56	R.2781 & 2782	R.2786	X-rays of Charles Cobble's teeth (stipulated)
R.2796	S-57	R.2795	R.2796	Case No. 73-3334 - teeth pictures
R.2796	S-58	R.2795	R.2796	" " "
R.2796	S-59	R.2795	R.2796	" " "
R.2797	S-60	R.2796 & 2797	R.2797	Case No. 73-3334- dental X-rays post mortem
R.2816	S-61	R.2798	R.2816	Case No. 73-3334 -X-rays-teeth of Marty Ray Jones
R.2812	S-62	R.2812	R.2813	Case No. 73-3377 - jawbone picture (Also see R.2801-2)
R.2812	S-63	R.2812	R.2813	" " "
R.2812	S-64	R.2812	R.2813	" " "

Copied from the holdings of the Texas State Archives

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
R.2812	S-65	R.2812	R.2813	Case No. 73-3377-jaw-bone picture(Also see R.2801-2)
R.2816	S-66	R.2813	R.2816	Case No. 73-3377, X-rays
R.2816	S-67	R.2815	R.2816	Homer Garcia X-rays
R.2832	S-68	R.2828 R.2817 R.2831	R.2832	Case No. 73-3409, teeth pictures Frank Aguirre
R.2832	S-69	R.2828	R.2832	" " "
R.2832	S-70	R.2828	R.2832	" " "
R.2832	S-71	R.2828	R.2832	" " "
R.2832	S-72	R.2828	R.2832	" " "
R.2832	S-73	R.2829	R.2832	Case No. 73-3409, X-ray pictures of teeth
R.2832	S-74	R.2829 & 2830	R.2832	Case No. 73-3409, Frank Aguirre dental chart
R.2842	S-75	R.2842	R.2843	Case No. 73-3412, Johnny Ray Delone teeth X-rays
R.2842	S-76	R.2840	R.2843	Teeth & jaw bone pictures
R.2842	S-77	R.2840	R.2843	" " "
R.2842	S-78	R.2840	R.2843	" " "
R.2842	S-79	R.2840	R.2843	" " "
R.2842	S-80	R.2841	R.2843	Case No. 73-3412, teeth X-rays from body of Johnny Ray Delone
R.2924	S-81	R.2845	R.2924	X-Rays of Billy Ray Lawrence's teeth

Copied from the holdings of the Texas State Archives

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
	S-82	R.2919	R.2927	Case No. 73-3412, bullet from Johnny Delone
	S-83	R.2928 R.2953		Known Billy Lawrence pictures--teeth
R.2958	S-84	R.2957	R.2958	Photo of William Ray Lawrence(R.2970:cut out of Houston Post)
R.3113	S-85	R.3031	R.3113	Shoes from Exhibit 52 on which Henley pubic hair was found
		R.3129		Exhibit 85 identified by Mrs. Shirley, Billy Lawrence's mother
R.3113	S-86	R.3032	R.3113	Blue shirt identified at R.3109 as Cobble's had Henley pubic hair on it(See Exhibit 52)
R.3113	S-87	R.3034 & 3035	R.3113	Briefs-2 pairs-Henley head hair & pubic hair found thereon
R.3065	S-88	R.3063	R.3065	Henley driving school records
R.3065	S-89	R.3063	R.3065	" " "
	S-90	R.3085	R.3121	Diagram of Ben Hur Apartments
	S-91	R.3096		(Objection sustained at R. 3197)
R.3120	S-92	R.3119	R.3120	Blue jeans from Exhibit 52
R.3120	S-93	R.3119	R.3120	Belt from Exhibit 52
R.3120	S-94	R.3120	R.3120	Brown pants(identified as Marty Jones' pants by his mother at R. 3130 & by Mrs.Cobble at R.3120)

Copied from the holdings of the Texas State Archives

PAGE WHERE OBJECTION EXPRESSLY WAIVED	STATE'S EXHIBIT NUMBER	PAGE MARKED & REFERRED TO	PAGE ADMITTED	ITEM
R.3120	S-95	R.3120	R.3120	Shoes
	S-96	R.3228		Detective Smith notes (Objection sustained at R.3231)

Witnesses are listed, with daily copy page numbers, at the beginning of various trial volumes. A list of trial on guilt witnesses shown by the clerk's page numbers of the record is here shown:

LIST OF TRIAL ON GUILT ISSUE WITNESSES

CLERK'S PAGE NUMBER	VOLUME NUMBER	WITNESSES
	Vol.X(Trial Vol.I)	
R.2241		J.B. Jamison
R.2266		W.L. Lawrence
R.2286 to R.2375		David Mullican
	Vol.XI(Trial Vol.II)	
R.2386		Judge Russell Lee Drake
R.2414		David Mullican (cont'd)
R.2589		H.J. Nassif
R.2601		Edwin L. Goad
R.2633 to R.2645		William Lloyd Moore
	Vol.XII(Trial Vol.III)	
R.2654		Jim D. Tucker
R.2678		K.D. Porter
R.2691		Willie Young
R.2713		Juror Walton Theis

Copied from the holdings of the Texas State Archives

CLERK'S PAGE NUMBER	VOLUME NUMBER	WITNESSES
R.2714-15		Juror Adolph Martinez
R.2717		Juror Alfred Prinz
R.2717		Juror Mary Ann McCardy
R.2718		Juror (Mrs.) Inglett
R.2719		Juror (Mrs.) O'Brien
R.2721		Juror Rosemary Tull
R.2721		Juror (Mrs.) Gonzalez
R.2722		Juror (Mrs.) Green
R.2723		Juror (Mrs.) Reese
R.2724		Juror Rudy Rivera
R.2724		Miss Jim Scott Jones
R.2726		Peter Franklin
R.2732		Jurors all said calls did not influence verdict
R.2732		Willie Young
R.2753		Ofer Norbett LeBlane
R.2786 to R.2879		Dr. Joseph Jachimczyk
	Vol.XIII(Trial Vol.IV)	
	EXAMINATION OF JURY PANEL (BY THE COURT)	
R.2888		Alfred Prinz
R.2889		Mary Ann McCardy
R.2891		Eusevio Gonzales
R.2892		Billy Ray Rook
R.2893		Jim Scott Jones
R.2894		Rosemary Tull
R.2896		(Witness) Jim ?

Copied from the holdings of the Texas State Archives

CLERK'S PAGE NUMBER	VOLUME NUMBER	WITNESSES
R.2899		Entire panel
R.2900		Dr. Joseph Jachimczyk (cont'd)
R.2939		Jack Pruitt
R.2982		Fred W. Rymer
R.3003		James Zotter
R.3062		John Tomlin
R.3074		Louis Garcia
R.3082		Shirley Dollens
R.3104		Betty Cobble
R.3105 to R.3117		Gerald Oncale
	Vol.XIV(Trial Vol.V)	
R. 3129		Billy Joe Shirley
R.3131		Josephine Aguirre
R.3134		Horace J. Lawrence
R.3138		Ray E. Whigham
R.3149 to R.3245		Sidney Smith
R.3245		STATE RESTS

Copied from the holdings of the Texas State Archives

REPLY TO POINTS OF ERROR ONE TO FIFTEEN INCLUSIVE

Appellant groups his first fifteen points of error together, and the State makes comparable reply.

The points of error are as follows:

POINT OF ERROR NO. ONE

The trial court committed reversible error in denying appellant's motion for change of venue without a hearing, in violation of Article I, Section twelve, Vernon's Annotated Texas Constitution.

POINT OF ERROR NO. TWO

The trial court committed reversible error in denying appellant an evidentiary hearing on his motion for change of venue, in violation of Articles 31.03 and 31.04, Vernon's Annotated Code of Criminal Procedure.

POINT OF ERROR NO. THREE

The trial court committed reversible error in denying appellant an evidentiary hearing on his motion for change of venue, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

POINT OF ERROR NO. FOUR

The trial court committed reversible error in refusing to permit appellant to introduce evidence on a bill of exception to the court's denial of his motion for change of venue.

POINT OF ERROR NO. FIVE

The trial court committed reversible error in denying appellant's motion for change of venue, in violation of Article I, Section twelve, Vernon's Annotated Texas Constitution.

POINT OF ERROR NO. SIX

The trial court committed reversible error in denying appellant's motion for change of venue, in violation of the Sixth and Fourteenth Amendment to the Constitution of the United States.

Copied from the holdings of the Texas State Archives

POINT OF ERROR NO. SEVEN

The trial court's denial of a change of venue deprived appellant of a fair trial by an impartial jury.

POINT OF ERROR NO. EIGHT

The trial court committed reversible error in refusing to continue the trial for a reasonable period of time in order to alleviate the massive publicity connected with the cases.

POINT OF ERROR NO. NINE

The trial court's arbitrary denial of a continuance deprived appellant of a fair trial by an impartial jury.

POINT OF ERROR NO. TEN

The trial court committed reversible error in refusing to permit appellant to introduce evidence in support of his motion for continuance.

POINT OF ERROR NO. ELEVEN

The trial court committed reversible error in refusing to permit appellant to introduce evidence on a bill of exception to the court's denial of his motion for continuance.

POINT OF ERROR NO. TWELVE

Appellant was denied a fair trial by an impartial jury because of the trial court's failure to protect him sufficiently from the massive, pervasive and prejudicial publicity that attended his arrest, pre-trial hearings and trial.

POINT OF ERROR NO. THIRTEEN

Appellant was denied a fair trial by an impartial jury because of the trial court's denial of his several motions to sequester the jury.

POINT OF ERROR NO. FOURTEEN

Appellant was denied a fair trial by an impartial jury because of the trial court's denial of a mistrial after various media representatives contacted members of the juror's (sic) families during the course of the trial.

Copied from the holdings of the Texas State Archives

POINT OF ERROR NO. FIFTEEN

Appellant was denied a fair trial by an impartial jury because the trial court, over timely objection, permitted twelve media representatives to be seated in an "extra" jury box, behind the bar and directly facing the jury.

Appellant's 48-page argument on these points of error (pages 87 to 135 of his brief) has as its keystone a factually incorrect statement which is at page 134 of his brief and reads as follows:

> "The trial court denied appellant his statutory right to perfect his bills of exception to the court's denial of his motions for change of venue and for continuance."

At R. 773, lines 9-10, the court promised ample opportunity to make bills of exception and this was done.

Here is the exact language of the court (R. 3491, lines 13 to 16) in pertinent part:

> "The defense may offer any evidence...pursuant to any Bills of Exception...at this time."

Appellant relies (page 87 of his brief) upon Article I, §10, Texas Constitution Bill of Rights, and Article 3 §45, Texas Constitution, as follows:

> "In all criminal prosecutions the accused shall have a speedy trial by an impartial jury." [Art. I §10, Bill of Rights, Tex. Const.] [Emphasis added]

> "The power to change venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law; and the legislature shall pass laws for that purpose." [Art. 3 §45, Tex. Const.]

Thereafter, in the rest of his 48-page venue argument (from page 87 to page 135 of his brief) appellant completely ignores the phrase "speedy trial" which is emphasized in the

Copied from the holdings of the Texas State Archives

quotation of Article I Sec. 10 of the Texas Bill of Rights.

It is respectfully submitted that when these fifteen points of error here in issue are considered collectively, in relation to the whole record, they amount to a complaint that the trial judge, Hon. Preston Dial, firmly,although fairly, stopped the extension of a demonstrated line of defense action, which, whether inadvertant or whether a strategy of great ingenuity, would have - had it not been stopped - made it impossible for the defendant ever to be tried in the State of Texas.

Stated simply, this line of action, whether inadvertant or strategy, demonstrated in the record at bar, was to use the right of news media to freedom of the press to spread the horrible facts of the crime in each city of trial by extensive preliminary hearings, until it would be impossible to pick an impartial jury there.

Then, after an extended delay, by change of venue or motion for continuance (or whatever else could result), to re-do the whole thing again, by further pre-trial hearings that would again make the sordid details of these crimes current in news reports.

NEED FOR VENUE CHANGE DISCLAIMED AS OF DECEMBER 17, 1973

Let us, to begin with, look at R. 3832. There, in Harris County, in the 178th District Court, four months and three days after the first three indictments (Re Cobble,

Copied from the holdings of the Texas State Archives

Jones and Lawrence) were returned against appellant (Tr. Vol. 1, pp. 17-20; Tr. Vol. III, pp. 20-22; Tr. Vol. IV, pp. 20-22) the defendant's pre-trial motions came on to be heard, and there was no motion for change of venue. We find, at R. 3833, lines 19-23, R. 3834, lines 9-11, and R. 3834, line 18 to R. 3836, line 23, thirteen pre-trial defense motions listed by Hon. Will Gray, as follows:

> THE COURT: Why don't you tell me the motions in the order you want to take them and let's give them a number, and I think it will probably help us both.
>
> * * * * * *
>
> MR. GRAY: The motion, affidavit of poverty, should be number one.
>
> * * * * * *
>
> MR. GRAY: And then the motion for discovery number two, Judge. That's the general motion for discovery.
>
> THE COURT: All right, sir. Which one do you want next?
>
> MR. GRAY: And then the motion for discovery of grand jury testimony number three.
>
> THE COURT: All right, sir.
>
> MR. GRAY: And motion to take oral depositions, number four.
>
> THE COURT: All right.
>
> MR. GRAY: And motion for separate and individual examination of the prospective jurors, number five.
>
> THE COURT: All right, sir.
>
> MR. GRAY: And then in the event that one's overruled, the Defendant's motion to examine individually the venire persons who have heard or read about the case, number six.

Copied from the holdings of the Texas State Archives

THE COURT: All right, sir.

MR. GRAY: And the motion for additional pre-emptory challenges, number seven.

THE COURT: All right, sir.

MR. GRAY: And the motion to excuse prospective jurors for cause, number eight.

THE COURT: All right, sir.

MR. GRAY: And the motion to excuse for cause all veniremen who have read or heard about the case, number nine.

THE COURT: All right, sir.

MR. GRAY: And then the motion to limit the Court's questioning of prospective jurors as a panel, number ten.

THE COURT: All right, sir.

MR. GRAY: Motion to sequester the jury, eleven.

THE COURT: All right, sir.

MR. GRAY: Motion to be present at all stages of the formation of the jury, during the trial, number twelve.

THE COURT: All right, sir.

MR. GRAY: And I'd like to hold the motion in limine. I think it's premature at this time, depending on what the psychiatrists have to say and so on.

* * * * * *

Here, with all the news coverage relating to the search for bodies in the past, and in the very community from whose families the victims came, there is no claim at all of any such community prejudice as might make impossible the selection of a jury.

At R. 3942, line 19 to R. 3945, line 25, we find that the defense then disclaimed any desire for or expectation of

Copied from the holdings of the Texas State Archives

need for a change of venue from Harris County, the community of the alleged crimes, unless a jury could not be obtained.

AS OF JANUARY 17, 1974

Twenty-eight days later, on January 14, 1974, the defendant's motion to suppress came on (R. 3973). This was the date the court had previously announced the case (Harris County, Cause No. 198,892, Bexar County Cause No. 74-CR-424, alleged victim Charles Cobble) would be set for trial (R. 3943, lines 7-9).

At R. 3965 there begins a list of witnesses called by the defense who were put on the stand by the defense. The very listing of these witnesses takes more than five pages and ends, at R. 3970, with the defendant himself. The testimony brought out from defense witnesses at this hearing goes from R. 3980 to R. 5366 or 1384 pages of the record.

It was during this period of time that the news stories noted at pages 26 to 34 of appellant's brief were printed, most of them resulting from facts brought out by the defense at the motion to suppress. It was during this same period that the WOAI-TV log of television broadcasts noted by appellant (1-13-74 to 1-31-74 at pp. 72-73) in his brief were telecast.

This testimony was the source of the information of lurid detail which, having been developed in open court, became available for use as interesting background in news stories from that time on.

Let us examine, in summary, the evidence proved by

Copied from the holdings of the Texas State Archives

the defense after disclaiming intent to seek a venue change from Harris County, and as a direct result of which it was later claimed a fair trial could not be had 180 miles from Houston.

Appellant put on the witness stand, in part:

(1) Appellant's mother, Mrs. Mary Pauline Henley (R. 3980);

(2) A lawyer who considered himself the family lawyer, who testified he did not take the case (R. 4026);

(3) The Sheriff of San Augustine County, John Hoyt, who gave extensive testimony as to appellant's time spent in San Augustine curing the two-day body hunt there (R. 4071);

(4) Shelly Katz, a photographer and Defense Attorney Edward Pegelow, who testified about a visit to appellant at the Pasadena jail (R. 4149, R. 4158);

(5) Pasadena Police Sergeant David Mullican, the officer in charge of the murder investigation in that city, by whom was proved many explicit acts of the defendant relating to his many admitted murders (R. 4217 et seq).

During an overnight break in the testimony of Sergeant Mullican, at the beginning of the next day's session of this suppression hearing, the line of action, whether inadvertant or strategy, by which this defendant would never have been tried, appears above the surface in this sea of lurid and foreboding homicidal detail which the defense was providing the news media via the witness stand.

At R. 4222, line 11 to R. 4223, line 2, the record reads as follows:

> "THE COURT: All right. Now, as to the defendant Henley's first motion for a continuance, do you have anything that you wanted to proceed with on that before we go ahead?

Copied from the holdings of the Texas State Archives

> MR. GRAY: Yes, Your Honor, we would like to put on some testimony in support of that motion. It would require possibly a week's testimony in support of the motion. We would suggest to the Court that since one of the things we are complaining about is the publicity arising from this proceeding here that we conclude the hearing on the motion to suppress the confessions and then take up the motion for continuance at that time. [Emphasis added]

Thereafter, in excruciating detail, appellant's counsel, Hon. Will Gray, proceeded to bring out from the witness then on the stand the detail of the many murders by appellant as disclosed to Detective Mullican (R. 4225 et seq.), including contents of an affidavit (R. 4225 et seq.), which is in the record as Defendant's Exhibit No. 6 at R. 5424, and see Defendant's Confession, which is Defendant's Exhibit No. 7, marked at R. 4226, which is at R. 5427, and a supplemental offense report detailing some of Henley's conversations with officers, Defendant's Exhibit No. 9, marked at R. 4444, which is at R. 5433.

Officer Mullican testified, including cross examination, from (R. 4188 to R. 4445) as a defense witness, and eight pages later (R. 1501-1507) when called by the State.

Appellant called co-defendant David Brooks and required him to take the Fifth Amendment and refuse to testify (R. 4460 et seq.) and then called Detective Sidney Smith (R. 4465 to R. 4533).

Here appellant's counsel brought out, for the media via the witness stand, details of torture of the victims, as told by Henley to Detective Smith (R. 4516, line 23 to R. 4519, line 24):

Copied from the holdings of the Texas State Archives

A I asked him if they were tortured in any manner.

Q If they were tortured?

A Yes.

Q And in response to that question, what did he say, if anything?

A He said they were.

Q And then what happened? What did you ask him?

A I asked him specifically how.

Q And what did he say?

A He said some of them were kept, specifically, I believe he mentioned Billy Lawrence as being kept chained up for two or three days. Some of them had their pubic hairs pulled out. They were beaten by Dean Corll. He said Dean had some small glass rods that he utilized in his work at Houston Light and Power. He inserted them into the penis of a number of the victims. They used a rubber artificial penis, inserted that into the rectum of the victims.

Q What else?

A I think I mentioned they were beaten by Dean Corll.

Q Yes. You did mention that. Anything else?

A That's all that I recall.

Q This is the first time that you had obtained this information from Mr. Henley; is that right?

A Yes.

Q The first time you had obtained it from any source?

A Yes.

Q Did you ask anything else?

A I asked him did he recall where they were buried, each individual one.

Copied from the holdings of the Texas State Archives

Q This is on the trip from High Island?

A Yes.

Q What did he tell you?

A He named the location where they were all buried, where he felt they were all buried to the best of his knowledge.

Q Now, is there some report somewhere that contains that piece of intelligence?

A Yes. I believe that's contained in the offense report.

Q The original offense report?

A Supplement to the original.

Q Well, is it a supplement to the supplement or this supplement or what are we talking about?

A No. It's not that supplement.

Q It's another supplement?

A It was made at the time the offense report was written, a supplement to the original report reflecting this.

Q It's not the district attorney's supplement; it's some other supplement?

A Yes. That's correct.

Q Do you happen to know where that supplement is?

A It's at the office.

Q Could you by referring to that refresh your recollection and tell us specifically what Elmer Wayne Henley told you in reference to where these bodies are buried?

A He said that Charles Cobble and Marty Jones were buried together in a common grave, and they were tied together and buried in the boat shed.

Q What else?

A He said that Billy Lawrence was buried at Sam Rayburn. I think Mike Baulch was buried

Copied from the holdings of the Texas State Archives

at Sam Rayburn, but I don't recall at this time exactly what he said. I don't have it in my notes.

Q When did you make those notes?

A While driving back from High Island.

* * * * *

After putting on various other witnesses, mostly police officers (R. 4534-4953), appellant called Freddy Edison of KPRC Television (R. 4954), had the television clip of appellant's August 8, 1973, televised phone conversation with his mother run, had the clip and a transcript thereof put in evidence as Defendant's Exhibits No. 12A and 12B (R. 4958). The transcript is at R. 5441-2.

Thus, this four month old telephone conversation of mother and son, previously limited to the Houston area, where appellant's counsel saw no need for a venue change in December of 1973, was, by way of admission in evidence as a defendant's exhibit, given to the news media of the world for full dissemination.

At R. 4973 facts of a feature nature were developed. Appellant's counsel, obviously knowing what the answers to his questions would be, proved by Houston Homicide Officer Carl Siebenicker that Henley had, on being shown photographs by this officer, identified by name the officer's first cousin, Marty Jones, as one of the victims buried at the boat shed (R. 4974-4976).

The bodies of the officer's cousin and Charles Cobble were in such condition that the officer could not make certain identification of his cousin at the boat shed, appellant's

Copied from the holdings of the Texas State Archives

counsel proved (R. 4990-4991).

At R. 5148, line 12 to R. 5149, line 20, the line of action resulting in the defense avoiding trial by generating pre-trial publicity again surfaced, as follows:

> THE COURT: All right. It's 10:35 now. And we have been in conference in the Court's chambers since 8:30, taking up various legal matters concerning the trial, the offense and the prosecution. The Defendant's counsel has requested that we recess at this time until tomorrow morning at 9:00 o'clock to give them an additional opportunity to, one, talk to the Defendant relative to his testimony and, two, to secure witnesses for the continuation of the motion to suppress, for the further presentation of evidence in regards to the motion for a continuance. So the Court has agreed to recess until tomorrow morning at 9:00 o'clock.
>
> I will ask each of you to keep your seats until such time as the bailiff can retire the Defendant.
>
> All right. We will stand recessed until tomorrow morning at 9:00 o'clock.
>
> (Day's recess.)
>
> THE COURT: Mr. Gray, let me ask you and Mr. Vance: Steamer has got some twenty-five or thirty instanter subpoenas.
>
> MR GRAY: He has about fifty now, Your Honor. He will have about thirty more.
>
> * * * * *

The defendant then proceeded to take the stand (R. 5151).

Counsel for appellant there expressly asked that the hearing, "at this time", not be limited to <u>voluntariness</u> of the confession, and the <u>truth</u> <u>or</u> <u>falsity</u> of the confession of appellant not be open for inquiry (R. 5152-5153).

Then, from the witness stand, the defendant, with a true flair for words, proceeded to sketch for the news media

Copied from the holdings of the Texas State Archives

a graphic pattern of his manner of living and his association with Dean Corll (R. 5154 et seq.)

As an example, take his direct testimony as follows (R. 5154, lines 22-25; R. 5155, lines 15-20; R. 5155, line 23 to R. 5156, line 2; R. 5156, lines 6-12; R. 5156, line 19 to R. 5158, line 13; R. 5158, line 23 to R. 5159, line 2; R. 5159, line 17 to R. 5160, line 18):

Q Did you have occasion, Mr. Henley, to make a call to the police at any time on the morning of August the 8th, 1973?

A Yes, sir.

* * * * *

Q Did you report anything to the police at that time?

A That I had shot Dean Corll.

Q Did you tell them anything else?

A Well, I guess I told them the address. They showed up.

* * * * *

Q Let me ask you this: What was your physical condition at the time you made this phone call?

A Hung over, half drunk and stoned would be a good way to go into it.

* * * * *

Q All right. How did you happen to get into this condition? Had you had any intoxicating liquors to drink the previous evening and earlier that morning?

A Well, I generally drink beer from the time I get off work till the time I lay down. But I had a quart of moonshine that night.

* * * * *

Q When did you consume this, that night or the

Copied from the holdings of the Texas State Archives

previous evening and the morning of the 8th, or when?

A Well, it was pretty late at night when we headed for Dean's. And I picked that up on the way.

Q Now, you say, "When we headed for Dean's." Who are you talking about beside yourself?

A Tim Kerley and I.

Q Was this on the morning of the 8th or the evening of the 7th, if you recall?

A I couldn't tell you the time. I refer to it as my day.

Q As what?

A As my day. My day starts after I get off work till I go to work the next day at night. See, I am turned around.

Q All right. Had you had any drugs or anything else that might have influenced you mentally and physically during this period?

A Pot is a way of life with me, so I had been smoking pot.

Q Had you smoked pot that evening?

A I am sure I did.

Q Do you recall?

A Well, yeah. I recall smoking some pot.

Q Now, when you say pot, is that marijuana?

A Yes, sir.

Q What else had you had, if anything?

A T.H.C.

Q Tell us what that is?

A I believe that translates -- I wouldn't be sure -- tetrahydrocannabinol. It's the derivative from pot. It's the active ingredent (sic) that gets you high. It's a highly hallucinogenic downer type drug.

Copied from the holdings of the Texas State Archives

Q Either of these drugs ever cause you to hallucinate or have flashbacks of any kind?

A T.H.C., if it's a good T.H.C., will cause you to hallucinate. That's the sole purpose of doing it.

Q Well, was this good T.H.C. you had had that evening?

A Yes, sir. I don't do T.H.C. unless it's good T.H.C.

* * * * *

Q All right. Had you had anything else that would influence your mental or physical condition?

A Oh, yeah. Well, we went over to Dean's to snort some acrylics.

* * * * *

Q How do you go about sniffing this stuff?

A Well, you get yourself a lunch sack, curl the edges down and wad up some toliet (sic) paper or paper towel and put it down the middle of it, spray some acrylics in there, put it around your face and inhale.

Q Does this affect you immediately?

A Well, just about immediately, within a minute or so.

Q Uh huh. And the effect it has on you is that you blank out within a minute or so after you inhale this?

A Generally I do, because of the large spray.

Q Did you on this occasion?

A Yes, sir. I don't remember anything, so I guess I blanked out.

Q What time did you inhale this acrylic?

A I couldn't tell you.

Q Was it on the morning of the 8th, some time during the morning of the 8th?

Copied from the holdings of the Texas State Archives

A Early morning, dark morning.

Q It wasn't daylight yet?

A No, sir.

Q Now, you said you went over to Dean's house to sniff this acrylic. Are you talking about Dean Corll's house?

A Yes, sir.

* * * * *

Appellant then told of going to Dean Corll's house with Tim Kerley the first time on that occasion, and then, after "blanking out," finding himself literally climbing the front of Rhonda Williams' house in the Heights (a section of northwest Houston) and knocking on her window (R. 5161). She had already sneaked out. Kerley was with him, and found her around the corner (R. 5162).

They went back to Corll's, it still being in the dark before the August 8, 1973 morning.

The next thing Henley remembered was waking up with Dean Corll "slapping handcuffs" on him (R. 5163).

He was on Corll's living room floor, and Rhonda and Tim were there, lying to the side of him (R. 5164).

Henley started a running conversation to try to talk Corll into letting him up (R. 5165).

Eventually Corll did this. Henley got a drink (probably moonshine) and watched Corll drag his two friends around (R. 5166).

Corll had gathered up the guns and knives before he took off Henley's handcuffs (R. 5167).

In the bedroom where they were tied down, Dean Corll

Copied from the holdings of the Texas State Archives

eventually handed Henley a knife and told him to take Rhonda's clothes off. She was tied down on the floor beside Kerley (R. 5167-5168).

Rhonda asked if it was for real. Henley said it sure looked like it to him. Henley cut Rhonda's clothes off. Corll had the pistol at that time, but eventually laid it down (R. 5168) on a chest of drawers (R. 5169).

Henley walked out of the room, came back, saw Dean stripped down and on top of Kerley. He saw the gun, got it, told Dean to "back up and let these people up," and when Corll got up and took a step toward Henley, Henley "guessed" that he shot Corll (R. 5169).

Henley released Kerley and Rhonda, covered Corll's body (R. 5170) and told Rhonda and Kerley to leave, but they did not (R. 5170). First Rhonda and then Henley cried, and "along the line" he apparently called police (R. 5171), and waited seated on the front curb with Rhonda and Kerley until the police arrived (R. 5172).

It was the first time Dean Corll had ever put handcuffs on Henley in a serious capacity, not just playing around to show someone else how they work, and Henley was surprised, shocked and very frightened (R. 5279).

He figured Corll "might even kill us" (R. 5287).

It must be born in mind that at this time the defense had proved up in great detail the admissions Henley had made to police officers, particularly those made to Mullican and Smith. These admissions, along with Defense Exhibit No. 7

Copied from the holdings of the Texas State Archives

(R.4270, R.5427), Henley's confession, and Defense Exhibit No. 9 (R. 5433-5434) a supplementary police report, showed the pattern of action in which appellant lured other boys to Corrll's house, tricked them into handcuffs, for Corll's sex play and for death, and often killed them himself and helped bury them.

All these prejudicial facts, adverse to Henley, had been given to the news media by route of the witness stand by reason of the defense motion to suppress.

It had been done shortly before jury selection was scheduled to start, and after the defense had announced it saw no reason for a change of venue.

On February 1, 1974, the 176th District Court of Harris County announced that it had filed, "as of last night," its findings of fact as to voluntariness and admissibility of the defendant's oral and written confessions (R. 5399).

On the same day, February 1, 1974, Judge Hatten, on his own motion (R. 298), entered an order for change of venue in Harris County, Cause No. 198,892, this being No. 74-Cr-424 in Bexar County (R. 16-18).

FEBRUARY TO JUNE, 1974, PRE-TRIAL AT BEXAR COUNTY

On February 25, 1974, Judge Preston Dial of the 175th District Court in Bexar County, wrote to attorneys on both sides, setting the case for calling on April 8, 1974, at 9:30 a.m., in order that the pre-trial transcription of evidence from Houston could be ready, to prevent another evidentiary hearing on confessions which "might generate needless publicity in Bexar County" (R. 14-15) (Emphasis added)

It is to be noted that the 176th District Court in

Copied from the holdings of the Texas State Archives

Harris County had, on January 9, 1974, by written order, directed that all pre-trial motions be presented to the court in Cause No. 198892 (74-CR-424) on January 14, 1974 (R. 88-89).

Appellant in Harris County filed no motion to change venue. Instead, on January 16, 1974, appellant filed a motion for continuance (R. 95-102).

In this motion he asked, by reason of pre-trial publicity, that the case be continued "to a later date at this term of court, or that it be continued to a later term of court" (R. 101).

Note the change from Mr. Gray's statement in open court on December 17, 1973 (R. 3832, R. 3945, lines 15 to 21) which had been as follows:

> "MR. GRAY: At this point, depending on the outcome of the voir dire, we have no intention of moving for a change of venue. The Court may on its own motion, if we are unable to obtain a jury here, transfer the case."

* * * * *

The effect was to seek, not a fair trial, but no trial at all, and at the most, one long delayed.

After the case was transferred to Bexar County the same efforts were continued, amounting to the endless urging of other court proceedings than those which would go forward to trial and conclusion of the cases.

The effect of defense demands for protracted ancillary proceedings pre-trial, with their inevitable effect of mushrooming news media coverage, could only make an increasing obstacle to prompt trial.

Copied from the holdings of the Texas State Archives

When Judge Dial wrote his letter of February 25, 1974 (R. 14-15), he emphasized the need to avoid pre-trial hearings that would generate needless pre-trial publicity. He set the case for April 8, 1974, for disposition of any pre-trial matters pending.

On April 8, 1974, the case was called by Judge Dial (R. 631), and on the second day, April 9, 1974, the defense asked for a full evidentiary hearing in Bexar County on the admissibility of the confessions, objecting to the court ruling on the basis of the four-volume record from Harris County (R. 751-752).

He also informed the court that he had prepared a motion for change of venue (R. 753). This motion was filed. It is at R. 366-a, and alleges that there exists against defendant in Bexar County:

> "...so great a prejudice...that he cannot obtain a fair and impartial trial of this cause in this county."

There are identical affidavits by nine compurgators attached (R. 366-b to 366-j, incl.) Each states that it is his opinion there is so great a prejudice in Bexar County against appellant that he cannot obtain a fair and impartial trial of said cause (No. 74-CR-424) in said county.

Three controverting affidavits were filed April 19, 1974, and a fourth was filed April 22, 1974 (R. 367-374).

In the meanwhile, 10 days after appellant filed his motion for change of venue in Cause No. 74-CR-424 <u>from</u> Bexar County, the 176th District Court in Harris County granted appellant's motion to change venue in the other five pending

Copied from the holdings of the Texas State Archives

causes to Bexar County (R. 366).

On motion of the defense, with the State's agreement, the six cases were consolidated for trial (R. 363-364).

This action was taken April 22, 1974 (R. 364, R.759).

The court noted the previously filed motion to change venue and stated that the court would not take evidence on it at this time (R. 760, line 18), but that the defense could put in the record anything in the form of affidavits or statements (R. 761, lines 1 and 2).

Apparently the defense did not take advantage of this opportunity to put hearsay into evidence, since no affidavits appear as exhibits in evidence as to this motion.

The court delayed its ruling, pending voir dire (R. 768) until a jury panel of 32 venire persons had been qualified (R. 2219). He then overruled the change of venue motion (R.2219).

The court declined to allow a pre-trial hearing to make a bill of exceptions on the venue matter (R. 2219), but allowed unlimited development of same later, concurrent with the motion for new trial hearing (R. 3491 et seq), and this was done, exhibits then being offered by the defense in a dual capacity (R. 3515, lines 3 to 11).

Appellant, prior to trial, had unsuccessfully sought to get the Supreme Cout of Texas to mandamus Judge Dial to make an earlier ruling on the motion for venue change (R.3515-3516).

Copied from the holdings of the Texas State Archives

On the day set for selection of the jury to start, July 1, 1974 (R. 767 et seq.) the defense sought:

(1) A hearing pre-trial on a new motion to quash the jury panel (R. 767)(overruled):

(2) A pre-trial hearing to make a bill of exception relating to the motion to quash (R. 768)(COURT:"I'll give you an opportunity to do that later");

(3) Again asked a pre-voir dire ruling on motion for change of venue (COURT:"The Court will rule on that Motion after an attempt has been made to qualify a jury")(R. 768)

(4) Sought postponement of jury selection until depositions relating to a motion to quash the indictment were completed and the motion was ruled on (R. 769);

(5) Sought a pre-trial ruling on admissibility of defendant's oral confessions (Court held them admissible)(R. 770);

(6) Renewed a motion for continuance, claiming "a fair trial cannot be had in Bexar County at this time," and wanted to then put on evidence relating to news stories about the case (R. 772)(Denied);

(7) Mr. Gray moved to withdraw as counsel for the defense (R. 772)(Denied).

After the court ruled on the effort of counsel to withdraw, the following occurred (R. 773, lines 2 to 10):

> THE COURT: Mr. Henley has most adequate counsel in this case.
>
> MR. GRAY: Well, Your Honor, we do not feel that we can effectively represent him in this unless we have Rulings and unless we are permitted to make our Bills of Exception as provided by the Constitution and the Statutes of this State and of the United States.
>
> THE COURT: I'll give you an opportunity to do that later. [Emphasis added]

* * * * *

Copied from holdings of Texas State Archives

The court sought to keep the publicity of the case at a minimum, with this order (R. 774, lines 2 to 7):

> THE COURT: Now, gentlemen, henceforth none of the attorneys in the case or none of the witnesses in the case are to make any public statements with regard to any of the aspects in this case, or have any conversations with any of the representatives of the news media, until further Orders of the Court.

* * * * *

The court ruled that there would be no press in the Central Jury Room, and none in the Grand Jury Room, where jury interrogation would proceed (R. 776).

A jury was selected, the case was tried, and, thereafter, as the judge had promised at R. 773, lines 9-10, the defense was given ample opportunity to make any bills of exception it wished to make at this time, extensive exhibits of news media publications were proved up, and are in boxes as part of the record to go forward.

Appellant has selected samples from these stories and has included them at pages 22 to 85 of his brief.

Appellant, in his brief at page 20 thereof, refers to five time periods:

(1) August 9, 1973 to January, 1974, which he describes as "The initial investigation, discovery of the 27 bodies and identification of victims.
(It is to be noted that in late December, in this period, appellant's counsel were of the opinion no change of venue <u>from Houston</u> was necessary. (R. 3942)

(2) January 13, 1974 to January 30, 1974 - Pre-trial hearing in Houston, Texas.
(It was during this period that evidence of witnesses called by the defense made the lurid

Copied from holdings of Texas State Archives